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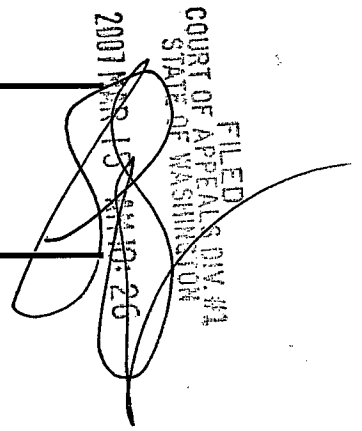

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

MICHAEL STEVEN KING,

Respondent,

v.

BRENDA LEONE KING,

Appellant,

STATE OF WASHINGTON BY SNOHOMISH COUNTY,

Involved Party.

BRIEF OF AMICUS CURIAE ROBERT M. MCKENNA, ATTORNEY GENERAL

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I. INTRODUCTION

Appellant, Brenda King ("Ms. King") brings this appeal based upon the contention that as a private litigant in a private dispute she has a right to counsel at taxpayer expense. This action, a marriage dissolution proceeding in which a parenting plan for the parties' minor children was at issue, is not among the narrow category of cases in which a private litigant has a right to counsel at public expense.

II. INTEREST OF AMICUS

The Attorney General of the state of Washington is a statewide elected official, who functions as the "legal adviser of the state officers." Wash. Const. art. III, §§ 1, 21; RCW 43.10.030. This Court granted the Attorney General's Motion for Leave to File Amicus Brief on February 9, 2007, and this brief is now offered by leave of this Court. The Attorney General's interests are more fully set out in conjunction with the motion for leave to file this brief. Mot. for Leave to File Amicus Br. at 1-2; Attorney General's Reply in Support of Mot. for Leave to File Amicus Br. at 1-2, 3-4.

III. ISSUE

Does the state or federal constitution obligate the State to provide counsel at taxpayer expense for indigent private parties to dissolution actions when the parenting or custody of a child is at issue?

IV. ARGUMENT

A. Providing A Right To Counsel At Taxpayer Expense For Civil Litigants Is, Except Under Narrow Circumstances, A Question Of Public Policy To Be Resolved By The Legislature, Not By The Courts

"The general rule in Washington, commonly referred to as the American rule, is that each party in a civil action will pay its own attorney fees and costs." *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 149 P.3d 666, 669 (2006) (discussing recovery of fees from the opposing party). In this appeal, Ms. King seeks to shift the burden of paying for her counsel not to the opposing party in her private dispute, but to the taxpayers. Neither the federal nor state constitutions provide Ms. King with a right to counsel at public expense in a dispute among private parties, including actions for the dissolution of marriage. Nor has the legislature provided for such a right by statute.

The provision of counsel to parties to private civil litigation at public expense is, in the first instance, a policy decision for the legislature. "It is the Legislature's prerogative, as the taxing and appropriating branch of government, to determine what actions other than those which are constitutionally mandated will be publicly funded." *In re Dependency of Grove*, 127 Wn.2d 221, 236, 897 P.2d 1252 (1995).[1] Washington law

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[1] *See also Doe v. Connecticut*, 216 Conn. 85, 579 A.2d 37 (1990) ("We do not have the authority to require the expenditure of public funds to the prevailing parties in

recognizes a right to counsel at taxpayer expense, in a civil setting, only under two circumstances: where the legislature has so provided by statute, and where the constitution so mandates. *See* RAP 15.2.

The legislature has recognized a right to counsel at public expense in limited categories of civil actions, including petitions for dependency and termination of parental rights. RCW 13.34.090. It is undisputed that Ms. King has no statutory support for her claim of a right to counsel at public expense. Her claim, therefore, depends upon extending a constitutional right to counsel beyond any previously-recognized bounds.

The right to taxpayer-paid counsel in a civil case has never been extended to actions for dissolution of marriage between private parties, even where issues concerning the parenting of children are involved. In civil cases, counsel at taxpayer expense is constitutionally required for a private litigant only in cases in which the litigant's physical liberty is threatened or where a fundamental liberty interest, such as the termination of parental rights, is at risk.[2] *Grove*, 127 Wn.2d at 237 (citing *Lassiter v.*

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cases where we, based on our own predilections, might favor an award of attorneys' fees.").

[2] The contrast between a termination action and a dissolution action is stark, foreclosing any claim that a right to counsel in one context implies it in the other. *See Harmon v. Harmon*, 943 P.2d 599, 605 n.5 (Okla. 1997) (distinguishing child custody and visitation issues that may arise in a dissolution action from the potential termination of all parental rights in a termination action); *see also, State ex rel. Ondracek v. Blohm*, 363 N.W.2d 113, 115 (Minn. Ct. App. 1985) (rejecting an argument that a party to a

Dep't of Social Servs., 452 U.S. 18, 25, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); *Tetro v. Tetro*, 86 Wn.2d 252, 544 P.2d 17 (1975); *In re Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974)).

There is a general presumption against a right to counsel at taxpayer expense in civil litigation between private parties, including actions for the dissolution of marriage. *Grove*, 127 Wn.2d at 237. Whether providing such counsel would be a desirable public policy, as Ms. King asserts, should accordingly be addressed to the legislature and not to the courts. *See In re Personal Restraint of Woods*, 154 Wn.2d 400, 437, 114 P.3d 607 (2005) (Chambers, J., concurring in part and dissenting in part) ("Providing publicly funded counsel for indigent petitioners is uniquely within the power of the legislature.").

B. A Private Action For The Dissolution Of Marriage Differs Substantially From A Government-Initiated Petition For Termination Of Parental Rights

Litigants in private disputes are generally presumed to have no right to counsel at public expense. *Grove*, 127 Wn.2d at 237. The narrow exceptions to this rule involve actions that, although civil in nature, bear potential consequences not unlike criminal prosecutions. In such actions, the force of the State is invoked to seek a judicial determination threatening a fundamental liberty interest. *Id.*

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dissolution action was entitled to an attorney at taxpayer expense based upon a comparison with a paternity action, in which the county attorney represented one party).

The circumstances of this case illustrate a vital distinction between a petition for the termination of parental rights, normally prosecuted by the State, in which a right to counsel at public expense attaches statutorily, and a dissolution dispute between spouses, in which no such right attaches. The consequences of an order terminating parental rights are dramatic, terminating the parent/child relationship completely and permanently. "Upon the termination of parental rights pursuant to RCW 13.34.180, all rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, visitation, or support existing between the child and parent shall be severed and terminated and the parent shall have no standing to appear at any further legal proceedings concerning the child." RCW 13.34.200. By statute, Washington recognizes a right to counsel at public expense for parents defending a petition for dependency or termination of parental rights under RCW 13.34.[3] RCW 13.34.090.

This action, in contrast, is a petition for dissolution of the parents' marriage; a private civil dispute initiated by private parties to resolve their legal rights *vis a vis* each other and their children. One required element

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[3] A termination action is preceded by a dependency action, in which the power of the state is invoked to potentially remove a child from the parents' physical and legal custody and place legal custody of the child with the state. RCW 13.34.130. A petition to terminate parental rights may follow. RCW 13.34.180.

of a decree of dissolution is the entry of a "parenting plan for any minor child of the marriage." RCW 26.09.050. Moreover, entry of a parenting plan does not terminate the parental rights of either parent, but rather allocates parental rights and responsibilities in such a way that they can be exercised by two parents no longer joined in marriage. It provides for the "resolution of future disputes between the parents, allocation of decision-making authority, and residential provisions for the child." RCW 26.09.184(2). Even where a parenting plan results in a child spending substantially more or all of the child's time with one parent rather than the other, both parents remain parents and retain substantial rights, including the right to seek future modification of the parenting plan. RCW 26.09.260. In short, the parenting plan divides parental roles and responsibilities, rather than terminating the rights of either parent, is not instituted by the State, and cannot be equated with a dependency or termination proceeding. Nor is the State a party to a dissolution action with regard to determining the manner in which parental rights are divided in the parenting plan. The State does not seek custody of the child or any rights with respect to the child.[4]

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[4] As the present case illustrates, a county prosecutor may appear in a dissolution action solely to represent the Department of Social and Health Services' financial interest in recovery of child support payments because the children received state-funded medical assistance. RCW 74.20.220; *see also* Br. of Involved Party at 2-3 (explaining prosecutor's limited role in this case). An appearance in this limited capacity does not

C. No Constitutional Right To Taxpayer-Paid Counsel Attaches In A Private Dissolution Action

Ms. King claims that she is constitutionally entitled to counsel at taxpayer expense. None of the four different theories that Ms. King offers support her contention.

1. Private Parties To A Dissolution Action In Which A Parenting Plan Is At Issue Enjoy No Due Process Right To Counsel At Taxpayer Expense

The United States Supreme Court set forth the standard governing claims of a due process right to counsel in a civil action in *Lassiter v. Department of Social Services*, 452 U.S. 18. That case arose out of a petition filed by the state of North Carolina to terminate the parental rights of Ms. Lassiter, and not an action to dissolve a marriage. *Id.*, 452 U.S. at 20-21. Even in that context, the Court did not reach a blanket conclusion that a parent faced with a termination action always had a constitutional right to counsel at taxpayer expense. The Court, rather, set forth standards under which the interests of the parties would be balanced against the presumption against a right to counsel at taxpayer expense in civil actions. *Id.* at 31-32.

Under *Lassiter*, courts begin with a presumption that parties to a civil action enjoy no constitutional right to counsel, and balance that

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change the essential character of a dissolution proceeding as a private dispute between private parties, and in no way invokes the power of the state to seek the termination of the parental rights of either party.

presumption against the three elements of a due process analysis established in an earlier decision. *Id.* at 31. These three elements consist of "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Id.* at 27 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

The application of the *Lassiter* test to a private dissolution action does not support Ms. King's claim of a right to counsel at taxpayer expense. First, the private interests at stake are not the termination of parental rights, as in *Lassiter*, but the allocation of parental rights and responsibilities between two divorcing parents. This reflects the necessities of dissolving a marriage, but does not deprive either parent of his or her legal relationship with the child. A parent in a dissolution action does not face the same risk as in a dependency or termination proceeding. After dissolution, both parents remain parents and retain substantial rights, including the right to seek modification of the parenting plan. RCW 26.09.260.

Second, the State's interest in not assuming the tremendous financial burden of providing counsel for all indigent parents with children in private dissolution actions is decidedly stronger than in termination actions. A termination action invokes the resources of the State in an

effort to end all parental rights. RCW 13.34.200 (describing the consequences of an order terminating parental rights). Termination actions are generally commenced by the State. *See* RCW 13.34.180. Such factors as the sufficiency and allocation of resources can be taken into account when deciding whether to proceed with such an action. In contrast, the State plays no role in deciding whether the marriage of two parents should be dissolved, and hence no role in deciding whether a dissolution petition should be filed. The State does not take sides as between the parties in developing the parenting plan and seeks no rights with respect to the child or children. The argument is exceedingly weak that the taxpayers must bear financial responsibility for actions that the State plays no role in commencing and in which it does not take sides.

Third, the risk that procedures used in resolving a petition for dissolution, specifically the absence of taxpayer-paid counsel, will lead to erroneous results is minimal. The legal standard governing the adoption of a parenting plan does not turn on the rights or interests of either parent, but rather the "best interests of the child." RCW 26.09.002. The child's interests are not merely protected by the adversarial process engaged in by the parents, but through other means. These include, where the court deems appropriate, the appointment of an attorney to represent the interests of the children—and at public expense when the parties are

indigent. RCW 26.09.110 ("The court may appoint an attorney to represent the interests of a minor or dependent child with respect to provision for the parenting plan"). Additionally, the court may seek the advice of professional personnel concerning the provisions of a parenting plan. RCW 26.09.210. The court may also appoint a guardian *ad litem* for the purpose of preparing an investigation and report concerning parenting arrangements. RCW 26.09.220. If both parents are indigent, the guardian *ad litem* is provided at public expense. RCW 26.12.175(1)(d). Finally, where a unified family court is established, state law authorizes the appointment of court facilitators "to provide assistance to parties with matters before the unified family court". RCW 26.12.802(3)(d).[5]

The balancing of these elements can be no more successful here in attempting to support a right to taxpayer-paid counsel than they were in *Lassiter*, and indeed can only be less so. A parent's interest in the adoption of a parenting plan is substantially less than his or her interest in a termination proceeding; the State simply plays no comparable role in a dissolution action to its role in a termination proceeding; and other means

[5] The court also has the authority, in appropriate cases, to shift expenses between parties by ordering one spouse to pay the other's attorney fees and costs, thereby equalizing the resources available to both spouses. RCW 26.09.140.

of safeguarding against erroneous results are provided.[6] *See Grove*, 127 Wn.2d at 237; *see also Poll v. Poll*, 256 Neb. 46, 588 N.W.2d 583 (1999) (surveying cases from numerous states and concluding that private parties are not entitled to counsel at public expense in dissolution actions);[7] *In re Smiley*, 36 N.Y.2d 433, 437, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975) (parties to a divorce action lacked a right to taxpayer-paid counsel because that right attaches only "when the State or Government proceeds against the individual with risk of loss of liberty or grievous forfeiture"); *Das v. Das*, 133 Md. Ct. Spec. App. 1, 28, 754 A.2d 441 (2000) (denying right to counsel at taxpayer expense in a divorce action based on the hypothetical possibility that a party might be found in contempt); *Lyon v. Lyon*, 765 S.W.2d 759, 763 (Tenn. Ct. App. 1988) (rejecting a claim of a right to taxpayer-paid counsel in a divorce action).

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[6] A California court applying the *Lassiter* factors to a claim of a right to taxpayer-paid counsel in a dissolution action characterized the situation as follows:

> We have a relatively weak private interest which favors requiring the taxpayers to fund appointed counsel, a risk of erroneous results which weighs moderately (at most) in favor of such a requirement, and a very strong government interest in not saddling the taxpayers with the cost.

Clark v. Superior Court, 62 Cal. App. 4th 576, 586, 73 Cal. Rptr.2d 53 (1998). The court held that, in light of this balance, "there is certainly not enough weight to overcome the presumption against counsel at public expense in civil cases."

[7] The Nebraska Court reasoned that a dissolution action, unlike a termination proceeding, "is one brought on by an individual involving a dispute between parents. The 'weapons' of the state have not been marshalled against the [parent]." *Poll*, 256 Neb. at 54.

It is accordingly clear that there is no federal due process right to counsel at taxpayer expense on behalf of parties to private dissolution actions. Ms. King's persistent efforts to equate termination proceedings with dissolution matters fail to support her argument to the contrary. Due process requirements depend upon the nature of liberty interests in particular kinds of cases, and accordingly it does not follow from the conclusion that counsel is required in a termination case that it must also be required in a dissolution matter. "[D]ue process is flexible and calls for procedural protections that the given situation demands." *In re Personal Restraint of Whitesel*, 111 Wn.2d 621, 630, 763 P.2d 199 (1988). For example, a lesser standard of due process is required in evaluating a prison inmate's claim of a right to counsel in a prison disciplinary hearing than would be applied to the same claim in the context of a parole revocation hearing. *Arment v. Henry*, 98 Wn.2d 775, 778, 658 P.2d 663 (1983).

Ms. King asserts, in the alternative, that even in the absence of a federal right, article I, section 3 of the state constitution might be read to guarantee counsel at public expense. Ms. King bases this argument, in part, on a state supreme court decision that pre-dated *Lassiter*. Br. of Appellants at 37-38 (citing *In re Welfare of Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974)). The Court concluded in that case that a parent had a right to counsel at public expense in an action for the termination of

parental rights. *Id.* at 138. The Court cited both the federal and state due process clauses for this conclusion. *Id.* (citing U.S. Const. Amend XIV and Wash. Const. art. I, § 3). As noted, the Court's construction of federal due process turned out to be erroneous, as the U.S. Supreme Court concluded in *Lassiter* that due process guarantees no categorical right to counsel, even in a termination action. *Lassiter*, 452 U.S. at 31-32.

The Washington Court in *Luscier* engaged in no separate analysis of the state provision, simply treating federal and state due process analysis as one. *Luscier*, 84 Wn.2d at 138. The legislature has subsequently resolved the question statutorily, providing counsel for parents in termination actions as a matter of statute. RCW 13.34.090. *Luscier*, accordingly, does not support Ms. King's argument.

More importantly, *Luscier* concerned a termination action, not a petition for dissolution. Even if Ms. King's argument about *Luscier* were correct with regard to a termination proceeding, this is not such an action.

Ms. King's *Gunwall* analysis fares no better. In *State v. Gunwall,* 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986), the Court set forth six factors to govern the question of whether a state constitutional provision should receive an independent construction from its federal counterpart: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions; (3) state constitutional history; (4) preexisting

state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state interest and local concern. Washington courts have concluded on numerous occasions that the state constitution's due process provision is identical in scope with its federal counterpart. *State v. Ortiz*, 119 Wn.2d 294, 304, 831 P.2d 1060 (1992) (concluding, after engaging in a *Gunwall* analysis, that federal and state due process analysis is the same).[8]

Even if the matter had not already been decided, the reasons cited in *Ortiz* for concluding that the *Gunwall* factors favor the same construction for the federal and state provisions are equally applicable in the context of a private action for dissolution of marriage. Since the language of the federal and state provisions are nearly identical, the first two factors favor construing them the same way.[9] *Ortiz*, 119 Wn.2d at 302-03. Ms. King incorrectly asserts that the third and forth *Gunwall* factors favor an independent construction of the state provision, based on

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[8] *See also In re Personal Restraint of Matteson*, 142 Wn.2d 298, 310, 12 P.3d 585 (2000) (rejecting an argument based on *Gunwall* factors for more stringent construction of state provision); *State v. Manussier*, 129 Wn.2d 652, 679, 921 P.2d 473 (1996) (same); *City of Seattle v. McConahy*, 86 Wn. App. 557, 565, 937 P.2d 1133 (1997) ("Because the text of our provision is so similar to the federal one, our Supreme Court has held that they are to be interpreted the same way"; citing *Ortiz*, 119 Wn.2d at 304).

[9] Ms. King contends that other provisions of the state constitution, besides article I, section 3, suggest giving due process a different treatment. Br. of Appellant at 36. Ms. King fails to offer a reason why this would be so. Any claim that those provisions guarantee Ms. King a right to counsel at taxpayer expense should be considered based on their own text, and their inclusion in the constitution suggests nothing about due process analysis.

the erroneous notion that the common law provided a right to counsel in civil cases. Br. of Appellant at 36. Ms. King cites to no Washington case recognizing such a right, and to the extent Washington courts have addressed the question, it has been rejected.[10] *See In re Custody of Halls*, 126 Wn. App. 599, 611 n.4, 109 P.3d 15 (2005) ("No Washington case has held that a party to a child custody dispute is entitled to representation at State expense"); *see also May v. Sharon*, 377 Pa. Super. Ct. 261, 265, 546 A.2d 1256 (1988) (rejecting claim to a right to counsel in a civil case). The *Ortiz* Court also rejected reliance upon the fifth factor as supporting an independent state construction, finding that it shed no light on the issue. *Ortiz*, 119 Wn.2d at 303. The sixth factor similarly suggests no basis for offering an independent state construction because while dissolution proceedings are governed by state law, they raise no uniquely local due process concerns. There is, in short, no valid reason to depart from the established principle that federal and state due process provisions are construed the same way.

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[10] Ms. King instead relies upon a medieval English statute for the proposition that the common law vested at least some private litigants with a right to free counsel. Br. of Appellant at 21 (citing 11 Hen. 7, c. 12 (1495)). Ms. King's citation is to a statute enacted during the reign of King Henry VII (father of the more famous Henry VIII), which did not provide for counsel at public expense at all. Rather, it obligated lawyers to serve in certain circumstances "without any reward taken therefore". 11 Hen. 7, ch. 12 (1495) (quoted in *In re Amendments to Rules Regulating the Florida Bar*, 573 So. 2d 800, 802 (Fla. 1990)). The statute thus provided only for a form of mandatory *pro bono* service. *Colbert v. Rickmon*, 747 F. Supp. 518, 521-22 (W.D. Ark. 1990) (describing the statute as requiring service without compensation); *see also Bristol v. United States*, 129 F. 87, 88 (7th Cir. 1904) (same).

2. The State Constitution's Guarantee Of Access To The Courts Does Not Entitle Private Litigants To Counsel At Taxpayer Expense

Ms. King also claims that she enjoys a right to counsel at taxpayer expense based upon article I, section 10, of the state constitution. That provision guarantees a right of access to the courts, but that provision does not encompass a right to counsel paid for by the taxpayers. "The civil litigant's right of access . . . has never been construed by our courts to provide a right to counsel at public expense in every proceeding." *Miranda v. Sims*, 98 Wn. App. 898, 902, 991 P.2d 681 (2000). Rather, the right is limited to those circumstances discussed in the previous section in which due process guarantees a right to appointed counsel. *Id.* (citing *Grove*, 127 Wn.2d at 237). Reliance upon this provision accordingly adds nothing to the analysis already set forth in the prior section.

Washington courts have generally applied article I, section 10, in two contexts: "the right of the public and press to be present and gather information at trial and the right to a remedy for a wrong suffered." Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide 24 (2002). At most, this provision addresses the availability of judicial processes, such as discovery, to all parties. Neither Washington's provision nor those of other states have been construed to create a right to counsel at taxpayer expense. *Doe v. Puget Sound Blood*

Ctr., 117 Wn.2d 772, 780, 819 P.2d 370 (1991) (right to discovery); *see also Doe v. Connecticut*, 216 Conn. 85, 98, 579 A.2d 37 (1990) ("open courts" provision of state constitution "was 'never intended to guarantee the right to litigate entirely without expense to the litigants, nor to impose upon the public the entire burden of the expense of the maintenance of the courts'" (quoting *In re Lee*, 64 Okla. 310, 168 P. 53 (1917)); *In re Smiley*, 36 N.Y.2d at 440 ("On no view of the matter is counsel required in a matrimonial action as a condition to access to the court"). Ms. King's arguments on this point amount to contending that it would be highly desirable to provide counsel to indigent litigants (Br. of Appellants at 21-23), but that question is properly addressed to the Legislature, and not the courts. *Grove*, 127 Wn.2d at 236.

3. The Courts' Duty To Administer Justice Impartially Does Not Mandate The Appointment Of Counsel At Taxpayer Expense

Ms. King next finds a right to counsel at taxpayer expense inhering in article IV, sections 1 and 30, which create Washington's courts. Ms. King's argument, which adds nothing to the points already made in other contexts, can be distilled to the simple proposition that counsel for indigent parties is desirable, and that accordingly the taxpayers must assume the obligation to pay for it. Br. of Appellant at 28-31. Ms. King cites several cases generally recognizing the value of counsel, but none

that support the notion that a court may not render impartial justice without them.[11] Opinions about public policy such as this are best presented to the legislature. *Grove,* 127 Wn.2d at 236.

4. The State Constitution's Privileges And Immunities Clause Does Not Create A Right To Counsel At Taxpayer Expense

Finally, Ms. King asserts a right to counsel at taxpayer expense based upon the privileges and immunities clause of the state constitution. Const. art. I, § 12. The privileges and immunities clause extends no such right, because Washington extends no "privilege" to any party; rather the State does not provide counsel at taxpayer expense to any party unless required by due process or mandated by statute.

The state privileges and immunities clause provides a remedy different than a federal equal protection analysis would support only when a state law affords a special privilege or immunity to a minority to the detriment of the majority.[12] *Grant Cy. Fire Prot. Dist. 5 v. City of Moses*

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[11] For example, Ms. King quotes an attorney discipline case in which the court noted the importance of lawyers in resolving disputes, but the court did so in the context of explaining the importance of the attorney-client privilege and why the attorney was sanctioned for breaching it. Br. of Appellant at 28-29 (citing *In re Disciplinary Proceeding Against Schafer*, 149 Wn.2d 148, 160, 66 P.3d 1036 (2003)). This observation suggests nothing regarding the proposition that the taxpayers must pay for representation of private parties in a private dispute.

[12] Ms. King's argument would fail under federal equal protection analysis. "'The equal protection clause does not require a state to eliminate all inequalities between the rich and the poor.'" *In re Personal Restraint of Runyan*, 121 Wn.2d 432, 449, 853 P.2d 424 (1993). Moreover, even if Ms. King could identify a state law that draws a distinction based on wealth, this would not be a suspect class entitled to strict scrutiny.

Lake, 150 Wn.2d 791, 807-08, 83 P.3d 419 (2004). The clause reflects a different concern than the federal equal protection clause, relating to governmental grants of special favoritism, or privileges, to a select minority within society. *Id.*

The State simply grants no special privilege to any favored minority by providing a court system for the resolution of private disputes. The fact that in a dissolution action one spouse may have counsel while the other does not in no way translates into a governmental grant of a special privilege to the represented spouse. This conclusion logically follows no matter which of the two modes of analysis of the privileges and immunities clause offered in a recent decision might be employed. *Andersen v. King Cy.*, 158 Wn.2d 1, 9, 138 P.3d 963 (2006) (Madsen, J, announcing the judgment) ("unless a law is a grant of positive favoritism to a minority class, we apply the same constitutional analysis under the [state's] privileges and immunities clause that is applied under the federal constitution's equal protection clause"); *see also id.*, at 58-59 (J.M. Johnson, J., concurring in the judgment) (stating that privileges and immunities analysis requires a two-part inquiry: "(1) Does a law grant a citizen, class, or corporation 'privileges or immunities,' and, if so, (2) are those 'privileges or immunities' equally available to all?"). Ms. King

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Id. at 448 (holding that at most such a classification might entail intermediate level scrutiny).

cannot prevail under either *Andersen* analysis because the State grants no special privilege to a favored minority with regard to dissolution proceedings.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the superior court with regard to the question presented.

RESPECTFULLY SUBMITTED this 14th day of March, 2007.

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CERTIFICATE OF SERVICE

I certify that on the 14th day of March, 2007, I caused a true and correct copy of Brief of Amicus Curiae Robert M. McKenna, Attorney General to be served on the following counsel via First Class United States Mail, postage prepaid, and by e-mail as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge.

Signed at Olympia, Washington this 14th day of March, 2007.

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